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February 2, 1996

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: Ex Parte Presentation -- CC Docket No. 93-22

Dear Mr. Caton:

On Friday, February 2, 1996, representatives of GE Information Services ("GEIS") made an ex parte presentation to Todd Silbergeld, Legal Advisor to Commissioner Andrew C. Barrett. Representing GEIS were Warner Sinback and the undersigned of this Firm. The views expressed on behalf of GEIS are reflected in the enclosed materials.

Please let us know if you have any questions.

Sincerely,

Joseph P. Markoski

Joseph P. Markoski

/jef
Enclosures

cc: Todd Silbergeld (w/out encl.)

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Information Services
GE Information Services, Inc.
401 N. Washington Street, Rockville, MD 20850

EX PARTE PRESENTATION -- POLICIES AND RULES IMPLEMENTING THE TELEPHONE DISCLOSURE AND DISPUTE RESOLUTION ACT, CC DOCKET NO. 93-22

I. LEGITIMATE INFORMATION SERVICE PROVIDERS HAVE TRADITIONALLY ESTABLISHED BUSINESS RELATIONSHIPS WITH CUSTOMERS THROUGH WRITTEN CONTRACTS OR THE USE OF GENERAL PURPOSE CREDIT CARDS.

- High-volume customers generally obtain information services pursuant to written contracts that are the product of face-to-face discussions with individual sales representatives.

- Home enthusiasts and small businesses generally subscribe to information services either through the mails, using preprinted order forms, or while on-line, using general purpose credit cards.

II. THE GROWING AWARENESS AND USE OF INFORMATION SERVICES HAVE CREATED ADDITIONAL OPPORTUNITIES TO MARKET SERVICES TO, AND ENTER SUBSCRIPTION AGREEMENTS WITH, NEW CUSTOMERS ON AN ON-LINE BASIS.

- Information service providers advertise their services in printed media, as well as in cyberspace. These advertisements invite potential customers to contact information service providers -- free of charge through an 800 Service number -- to obtain further information about their services and subscribe.

- Computer-literate customers, using their PCs or computer systems, are responding to these advertisements in increasing numbers.

- Whether prompted by advertising or exigent business circumstances, many customers are interested in subscribing and obtaining immediate on-line access to the information services about which they call.

- Many of these new customers are small-to-medium-sized businesses that require monthly invoices from their vendors.

- The use of 800 Service by these customers in contacting information service providers implicates the provisions of Section 228(c)(7) of the Act.

III. If the Commission Determines That "Written" Presubscription or Comparable Arrangements Are Necessary to Protect Consumers, It Should Permit the Use of Agreements That Are Electronically Transmitted and Executed.

- Electronic commerce -- i.e., freeing business from its dependence on paper and the physical handling and transmission of documents -- is at the heart of the Information Age and a prototypical use of the National Information Infrastructure.

- The use of on-line agreements will provide subscribers with immediate access to the information services they want and need. Requiring the use of agreements that are recorded on paper and sent through the mails will needlessly frustrate the efficient marketing of information services and delay their availability to consumers.

- The legitimacy of on-line agreements and their value in protecting consumers have been recognized by the amendments to Section 228(c) of the Communications Act made by the "Telecommunications Act of 1996."

- Any risk of loss presented by the use of on-line agreements lies with information service providers that offer service to subscribers pursuant to these agreements. If these agreements are unenforceable, information service providers may have difficulty collecting for their services; if these contracts are enforceable, subscribers will be protected by their terms.

- Consumers will be able to protect themselves by printing or downloading a copy of their subscription agreements and retaining them for their records.

- The use of on-line agreements will not materially increase the likelihood that presubscription or comparable arrangements are executed by individuals who are not legally competent. To the extent that the use of on-line agreements does enhance that possibility, information service providers -- and not consumers -- will be at risk.

- In short, the use of on-line agreements is totally consistent with the Telecommunications Act of 1996, the Telephone Disclosure and Dispute Resolution Act, and the Commission's goals in this proceeding.

- Therefore, if Section 64.1501(b) is to be amended, the rule should expressly permit the use of on-line agreements.

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104TH CONGRESS | 2d Session — SENATE — REPORT 104-______

TELECOMMUNICATIONS ACT OF 1996

______________, 1996.—Ordered to be printed

Mr. Pressler, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany S. 652]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 652), to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment, insert the following:

SEC. 602. PREEMPTION OF LOCAL TAXATION WITH RESPECT TO DIRECT-TO-HOME SERVICES.

(a) PREEMPTION.—A provider of direct-to-home satellite service shall be exempt from the collection or remittance, or both, of any tax or fee imposed by any local taxing jurisdiction on direct-to-home satellite service.

(b) DEFINITIONS.—For the purposes of this section—

(1) DIRECT-TO-HOME SATELLITE SERVICE.—The term "direct-to-home satellite service" means only programming transmitted or broadcast by satellite directly to the subscribers' premises without the use of ground receiving or distribution equipment, except at the subscribers' premises or in the uplink process to the satellite.

(2) PROVIDER OF DIRECT-TO-HOME SATELLITE SERVICE.—For purposes of this section, a "provider of direct-to-home satellite service" means a person who transmits, broadcasts, sells, or distributes direct-to-home satellite service.

(3) LOCAL TAXING JURISDICTION.—The term "local taxing jurisdiction" means any municipality, city, county, township, parish, transportation district, or assessment jurisdiction, or any other local jurisdiction in the territorial jurisdiction of the United States with the authority to impose a tax or fee, but does not include a State.

(4) STATE.—The term "State" means any of the several States, the District of Columbia, or any territory or possession of the United States.

(5) TAX OR FEE.—The terms "tax" and "fee" mean any local sales tax, local use tax, local intangible tax, local income tax, business license tax, utility tax, privilege tax, gross receipts tax, excise tax, franchise fees, local telecommunications tax, or any other tax, license, or fee that is imposed for the privilege of doing business, regulating, or raising revenue for a local taxing jurisdiction.

(c) PRESERVATION OF STATE AUTHORITY.—This section shall not be construed to prevent taxation of a provider of direct-to-home satellite service by a State or to prevent a local taxing jurisdiction from receiving revenue derived from a tax or fee imposed and collected by a State.

TITLE VII—MISCELLANEOUS PROVISIONS

SEC. 701. PREVENTION OF UNFAIR BILLING PRACTICES FOR INFORMATION OR SERVICES PROVIDED OVER TOLL-FREE TELEPHONE CALLS.

(a) PREVENTION OF UNFAIR BILLING PRACTICES.—

(1) IN GENERAL.—Section 228(c) (47 U.S.C. 228(c)) is amended—

(A) by striking out subparagraph (C) of paragraph (7) and inserting in lieu thereof the following:

"(C) the calling party being charged for information conveyed during the call unless—

"(i) the calling party has a written agreement (including an agreement transmitted through electronic medium) that meets the requirements of paragraph (8); or

"(ii) the calling party is charged for the information in accordance with paragraph (9); or";

(B)(i) by striking "or" at the end of subparagraph (C) of such paragraph;

(ii) by striking the period at the end of subparagraph (D) of such paragraph and inserting a semicolon and "or"; and

(iii) by adding at the end thereof the following:

"(E) the calling party being assessed, by virtue of being asked to connect or otherwise transfer to a pay-per-call service, a charge for the call."; and

(C) by adding at the end the following new paragraphs:

"(8) SUBSCRIPTION AGREEMENTS FOR BILLING FOR INFORMATION PROVIDED VIA TOLL-FREE CALLS.—

"(A) IN GENERAL.—For purposes of paragraph (7)(C)(i), a written subscription does not meet the requirements of this paragraph unless the agreement specifies the material terms and conditions under which the information is offered and includes—

"(i) the rate at which charges are assessed for the information;

"(ii) the information provider's name;

"(iii) the information provider's business address;

"(iv) the information provider's regular business telephone number;

"(v) the information provider's agreement to notify the subscriber at least one billing cycle in advance of all future changes in the rates charged for the information; and

"(vi) the subscriber's choice of payment method, which may be by direct remit, debit, prepaid account, phone bill, or credit or calling card.

"(B) BILLING ARRANGEMENTS.—If a subscriber elects, pursuant to subparagraph (A)(vi), to pay by means of a phone bill—

"(i) the agreement shall clearly explain that the subscriber will be assessed for calls made to the information service from the subscriber's phone line;

"(ii) the phone bill shall include, in prominent type, the following disclaimer:

'Common carriers may not disconnect local or long distance telephone service for failure to pay disputed charges for information services.'; and

"(iii) the phone bill shall clearly list the 800 number dialed.

"(C) USE OF PINS TO PREVENT UNAUTHORIZED USE.—A written agreement does not meet the requirements of this paragraph unless it—

"(i) includes a unique personal identification number or other subscriber-specific identifier and requires a subscriber to use this number or identifier to obtain access to the information provided and includes instructions on its use; and

"(ii) assures that any charges for services accessed by use of the subscriber's personal identification number or subscriber-specific identifier be assessed to subscriber's source of payment elected pursuant to subparagraph (A)(vi).

"(D) EXCEPTIONS.—Notwithstanding paragraph (7)(C), a written agreement that meets the requirements of this paragraph is not required—

"(i) for calls utilizing telecommunications devices for the deaf;

"(ii) for directory services provided by a common carrier or its affiliate or by a local exchange carrier or its affiliate; or

"(iii) for any purchase of goods or of services that are not information services.

"(E) TERMINATION OF SERVICE.—On receipt by a common carrier of a complaint by any person that an information provider is in violation of the provisions of this section, a carrier shall—

"(i) promptly investigate the complaint; and

"(ii) if the carrier reasonably determines that the complaint is valid, it may terminate the provision of service to an information provider unless the provider supplies evidence of a written agreement that meets the requirements of this section.

"(F) TREATMENT OF REMEDIES.—The remedies provided in this paragraph are in addition to any other remedies that are available under title V of this Act.

"(9) CHARGES BY CREDIT, PREPAID, DEBIT, CHARGE, OR CALLING CARD IN ABSENCE OF AGREEMENT.—For purposes of paragraph (7)(C)(ii), a calling party is not charged in accordance with this paragraph unless the calling party is charged by means of a credit, prepaid, debit, charge, or calling card and the information service provider includes in response to each call an introductory disclosure message that—

"(A) clearly states that there is a charge for the call;

"(B) clearly states the service's total cost per minute and any other fees for the service or for any service to which the caller may be transferred;

"(C) explains that the charges must be billed on either a credit, prepaid, debit, charge, or calling card;

"(D) asks the caller for the card number;

"(E) clearly states that charges for the call begin at the end of the introductory message; and

"(F) clearly states that the caller can hang up at or before the end of the introductory message without incurring any charge whatsoever.

"(10) BYPASS OF INTRODUCTORY DISCLOSURE MESSAGE.—The requirements of paragraph (9) shall not apply to calls from repeat callers using a bypass mechanism to avoid listening to the introductory message, provided that information providers shall disable such a bypass mechanism after the institution of any price increase and for a period of time determined to be sufficient by the Federal Trade Commission to give callers adequate and sufficient notice of a price increase.

"(11) DEFINITION OF CALLING CARD.—As used in this subsection, the term 'calling card' means an identifying number or code unique to the individual, that is issued to the individual by a common carrier and enables the individual to be charged by means of a phone bill for charges incurred independent of where the call originates.".

(2) REGULATIONS.—The Federal Communications Commission shall revise its regulations to comply with the amendment made by paragraph (1) not later than 180 days after the date of enactment of this Act.

(3) EFFECTIVE DATE.—The amendments made by paragraph (1) shall take effect on the date of enactment of this Act.

(b) CLARIFICATION OF "PAY-PER-CALL SERVICES".—

(1) TELEPHONE DISCLOSURE AND DISPUTE RESOLUTION ACT.—Section 204(1) of the Telephone Disclosure and Dispute Resolution Act (15 U.S.C. 5714(1)) is amended to read as follows:

"(1) The term 'pay-per-call services' has the meaning provided in section 228(i) of the Communications Act of 1934, except that the Commission by rule may, notwithstanding subparagraphs (B) and (C) of section 228(i)(1) of such Act, extend such definition to other similar services providing audio information or audio entertainment if the Commission determines that such services are susceptible to the unfair and deceptive practices that are prohibited by the rules prescribed pursuant to section 201(a).".

(2) COMMUNICATIONS ACT.—Section 228(i)(2) (47 U.S.C. 228(i)(2)) is amended by striking "or any service the charge for which is tariffed,".

SEC. 702. PRIVACY OF CUSTOMER INFORMATION.

Title II is amended by inserting after section 221 (47 U.S.C. 221) the following new section:

"SEC. 222. PRIVACY OF CUSTOMER INFORMATION.

"(a) IN GENERAL.—Every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunication carriers, equipment manufacturers, and customers, including telecommunication carriers reselling telecommunications services provided by a telecommunications carrier.

"(b) CONFIDENTIALITY OF CARRIER INFORMATION.—A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts.

"(c) CONFIDENTIALITY OF CUSTOMER PROPRIETARY NETWORK INFORMATION.—

"(1) PRIVACY REQUIREMENTS FOR TELECOMMUNICATIONS CARRIERS.—Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obbasis of an alleged violation of any general civil or criminal statute of such State.

(7) LIMITATION.—Whenever the Commission has instituted a civil action for violation of regulations prescribed under this section, no State may, during the pendency of such action instituted by the Commission, subsequently institute a civil action against any defendant named in the Commission's complaint for any violation as alleged in the Commission's complaint.

(8) DEFINITION.—As used in this subsection, the term "attorney general" means the chief legal officer of a State.

SEC. 228. [47 U.S.C. 228] REGULATION OF CARRIER OFFERING OF PAY-PER-CALL SERVICES.

(a) PURPOSE.—It is the purpose of this section—

(1) to put into effect a system of national regulation and review that will oversee interstate pay-per-call services; and

(2) to recognize the Commission's authority to prescribe regulations and enforcement procedures and conduct oversight to afford reasonable protection to consumers of pay-per-call services and to assure that violations of Federal law do not occur.

(b) GENERAL AUTHORITY FOR REGULATIONS.—The Commission by regulation shall, within 270 days after the date of enactment of this section, establish a system for oversight and regulation of pay-per-call services in order to provide for the protection of consumers in accordance with this Act and other applicable Federal statutes and regulations. The Commission's final rules shall—

(1) include measures that provide a consumer of pay-per-call services with adequate and clear descriptions of the rights of the caller;

(2) define the obligations of common carriers with respect to the provision of pay-per-call services;

(3) include requirements on such carriers to protect against abusive practices by providers of pay-per-call services;

(4) identify procedures by which common carriers and providers of pay-per-call services may take affirmative steps to protect against nonpayment of legitimate charges; and

(5) require that any service described in subparagraphs (A) and (B) of subsection (i)(1) be offered only through the use of certain telephone number prefixes and area codes.

(c) COMMON CARRIER OBLIGATIONS.—Within 270 days after the date of enactment of this section, the Commission shall, by regulation, establish the following requirements for common carriers:

(1) CONTRACTUAL OBLIGATIONS TO COMPLY.—Any common carrier assigning to a provider of pay-per-call services a telephone number with a prefix or area code designated by the Commission in accordance with subsection (b)(5) shall require by contract or tariff that such provider comply with the provisions of titles II and III of the Telephone Disclosure and Dispute Resolution Act and the regulations prescribed by the Federal Trade Commission pursuant to those titles.

(2) INFORMATION AVAILABILITY.—A common carrier that by tariff or contract assigns a telephone number with a prefix or area code designated by the Commission in accordance with subsection (b)(5) to a provider of a pay-per-call service shall

make readily available on request to Federal and State agencies and other interested persons—

(A) a list of the telephone numbers for each of the pay-per-call services it carries;

(B) a short description of each such service;

(C) a statement of the total cost or the cost per minute and any other fees for each such service;

(D) a statement of the pay-per-call service's name, business address, and business telephone; and

(E) such other information as the Commission considers necessary for the enforcement of this section and other applicable Federal statutes and regulations.

(3) COMPLIANCE PROCEDURES.—A common carrier that by contract or tariff assigns a telephone number with a prefix or area code designated by the Commission in accordance with subsection (b)(5) to a provider of pay-per-call services shall terminate, in accordance with procedures specified in such regulations, the offering of a pay-per-call service of a provider if the carrier knows or reasonably should know that such service is not provided in compliance with title II or III of the Telephone Disclosure and Dispute Resolution Act or the regulations prescribed by the Federal Trade Commission pursuant to such titles.

(4) SUBSCRIBER DISCONNECTION PROHIBITED.—A common carrier shall not disconnect or interrupt a subscriber's local exchange telephone service or long distance telephone service because of nonpayment of charges for any pay-per-call service.

(5) BLOCKING AND PRESUBSCRIPTION.—A common carrier that provides local exchange service shall—

(A) offer telephone subscribers (where technically feasible) the option of blocking access from their telephone number to all, or to certain specific, prefixes or area codes used by pay-per-call services, which option—

(i) shall be offered at no charge (I) to all subscribers for a period of 60 days after the issuance of the regulations under subsection (b), and (II) to any subscriber who subscribes to a new telephone number until 60 days after the time the new telephone number is effective; and

(ii) shall otherwise be offered at a reasonable fee; and

(B) offer telephone subscribers (where the Commission determines it is technically and economically feasible), in combination with the blocking option described under subparagraph (A), the option of presubscribing to or blocking only specific pay-per-call services for a reasonable one-time charge.

The regulations prescribed under subparagraph (A)(i) of this paragraph may permit the costs of such blocking to be recovered by contract or tariff, but such costs may not be recovered from local or long-distance ratepayers. Nothing in this subsection precludes a common carrier from filing its rates and regulations regarding blocking and presubscription in its interstate tariffs.

(6) VERIFICATION OF CHARITABLE STATUS.—A common carrier that assigns by contract or tariff a telephone number with a prefix or area code designated by the Commission in accordance with subsection (b)(5) to a provider of pay-per-call services that the carrier knows or reasonably should know is engaged in soliciting charitable contributions shall obtain from such provider proof of the tax exempt status of any person or organization for which contributions are solicited.

(7) BILLING FOR 800 CALLS.—A common carrier shall prohibit by tariff or contract the use of any 800 telephone number, or other telephone number advertised or widely understood to be toll free, in a manner that would result in—

(A) the calling party being assessed, by virtue of completing the call, a charge for the call;

(B) the calling party being connected to a pay-per-call service;

(C) the calling party being charged for information conveyed during the call unless the calling party has a preexisting agreement to be charged for the information or discloses a credit or charge card number during the call; or

(D) the calling party being called back collect for the provision of audio information services or simultaneous voice conversation services.

(d) BILLING AND COLLECTION PRACTICES.—The regulations required by this section shall require that any common carrier that by tariff or contract assigns a telephone number with a prefix or area code designated by the Commission in accordance with subsection (b)(5) to a provider of a pay-per-call service and that offers billing and collection services to such provider—

(1) ensure that a subscriber is not billed—

(A) for pay-per-call services that such carrier knows or reasonably should know was provided in violation of the regulations issued pursuant to title II of the Telephone Disclosure and Dispute Resolution Act; or

(B) under such other circumstances as the Commission determines necessary in order to protect subscribers from abusive practices;

(2) establish a local or a toll-free telephone number to answer questions and provide information on subscribers' rights and obligations with regard to their use of pay-per-call services and to provide to callers the name and mailing address of any provider of pay-per-call services offered by the common carrier;

(3) within 60 days after the issuance of final regulations pursuant to subsection (b), provide, either directly or through contract with any local exchange carrier that provides billing or collection services to the common carrier, to all of such common carrier's telephone subscribers, to all new subscribers, and to all subscribers requesting service at a new location, a disclosure statement that sets forth all rights and obligations of the subscriber and the carrier with respect to the use and payment for pay-per-call services, including the right of a subscriber not to be billed and the applicable blocking option; and

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OFFICE OF SECRETARY

September 1, 1995

Kathleen M.H. Wallman
Chief, Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 500
Washington, D.C. 20554

Re: CC Docket No. 93-22 -- Use of On-Line Agreements

Dear Ms. Wallman:

During our meeting of August 18, 1995, we discussed the adverse impact which the Commission's proposals in CC Docket No. 93-22 could have on the use of on-line, electronically transmitted agreements by legitimate information service providers ("ISPs"). At the conclusion of that meeting, you asked GE Information Services ("GEIS") to give some thought to the ways in which the Commission could achieve its goal of curtailing abusive practices on the part of unscrupulous ISPs, without erecting unwarranted obstacles to the use of on-line agreements by legitimate ISPs. GEIS has now had an opportunity to do so.

In considering the problem confronting the Commission, GEIS began by focusing on the differences between a rule that requires the use of "paper" contracts and one that permits the use of on-line contracts. GEIS has concluded that, while a rule requiring the use of "paper" contracts would have a serious adverse economic impact on legitimate ISPs, it would not provide consumers with substantially more protection against the practices of unscrupulous ISPs than a carefully crafted rule permitting the use of on-line agreements. In this regard, a rule allowing the use of on-line agreements would not appear to be much different than the Commission's existing rules, which permit the use of general purpose credit cards to obtain on-line access to information services.

At first blush, a rule requiring the use of "paper" contracts would appear to create a break (or "cooling off period") between the execution of a contract and the start of service. The delay, however, could be minimal if an unscrupulous ISP were to place order forms (i.e., "paper" contracts) in periodicals or on bulletin boards and encourage the filing of these orders by fax. (Some manufacturers of fax machines already use this technique to register warranties, check the performance of newly purchased devices, and establish service contracts.) Alternatively, and far easier, an unscrupulous ISP could begin providing service based on a caller's representation that a signed order form or contract is in the mail.

Similarly, a rule requiring "paper" contracts would appear to provide consumers with protection against unscrupulous ISPs by creating a physical (i.e., paper) record of their agreement. Such a physical record would exist, however, only if a consumer were to make, and then keep, a copy of its completed order form or contract. A rule requiring "paper" contracts would also appear to ensure that only legally competent individuals order information services. "Paper" contracts, however, will rarely -- if ever -- be delivered in person. Rather, they will be sent through the mails, by fax, or through some other means. As a consequence, a minor could easily represent himself/herself as an adult or use his/her parent's name and forge their signature. An unscrupulous ISP would not be concerned about the legal competence of the individual signing a contract and ordering service.

Notwithstanding the relatively modest differences between "paper" and on-line contracts, GEIS has concluded that there are ways in which the Commission can provide consumers with additional protection against unscrupulous ISPs without unduly restricting the use of on-line agreements.

> First, the Commission can prohibit carriers from performing billing and collection for information services provided pursuant to on-line contracts. Although such a requirement would not present a problem for most legitimate ISPs, it would make billing and -- more important -- collection difficult for unscrupulous ISPs.
>
> Second, the Commission can require ISPs that make use of on-line contracts to offer their subscribers the ability to print or download a copy of their on-line contract at no charge to the consumer. Such a requirement would provide consumers with a tangible record of their executed service agreement.
>
> Third, the Commission can prohibit ISPs that make use of on-line agreements from providing any information service to a customer during the call in which the customer first executes the on-line agreement. Although such a prohibition exalts form over substance, it will reduce the potential for confusion about whether the consumer will incur any charges during the first "toll

> free" call. Moreover, by requiring the consumer to hang up and place a second call (and, in the case of legitimate ISPs, more likely than not to a different number), such a requirement will provide the consumer with an opportunity to reflect -- however briefly -- on whether to make a second call and incur charges.

In addition to the three safeguards outlined above, GEIS considered a number of other alternatives that were based on the type of information service being provided and the identity of the customer being served. None of these alternatives, however, would likely be effective in halting the abusive practices of unscrupulous ISPs. GEIS, for example, considered proposing a rule that would limit the use of on-line contracts to business information services. An unscrupulous ISP could easily avoid such a limitation by packaging a legitimate, but never intended to be used, business service with the service actually desired by the consumer. Similarly, a non-business service (e.g., pornography) could be euphemistically labelled as a business service (e.g., a "graphic information management service"). Such a rule would also fail to take into account the fact that there are many services that could arguably find uses by both business and residential consumers.

GEIS also considered a rule that would limit the use of on-line contracts to business customers. This, too, would likely be unenforceable. An unscrupulous ISP could easily persuade callers to name their employer or their parents' employer as part of the application process. An unscrupulous ISP could also characterize a caller (or encourage a caller to characterize himself/herself) as a sole proprietor of a small business.

In addition to concerns about unscrupulous ISPs, your staff raised a question about the Commission's ability to adopt a rule in this proceeding that approves the use of on-line contracts, consistent with the requirements of the Administrative Procedure Act ("APA"). The question appears to be predicated on concerns about both notice and the record. Insofar as notice is concerned, the courts have consistently concluded that the Commission will be deemed to have complied with the requirements of the APA "so long as the content of the agency's final rule is a 'logical outgrowth' of its rulemaking proposal. . . . The focus of the 'logical outgrowth' test, we have added, 'is whether . . . [the party], ex ante, should have anticipated that such a requirement might be imposed.'" Aeronautical Radio, Inc. v. FCC, 928 F.2d 428, 445-46 (D.C. Cir. 1991).

In this proceeding, the Commission's Notice of Proposed Rulemaking ("Notice") expressly raised the question whether the Commission should revise Section 64.1501 of its rules so as to mandate "a contractual agreement, executed in writing." As you know, "writing" is a term of art in contract law. If "writing" includes, as GEIS believes it does, on-line contracts, the Commission plainly has given adequate notice of a rule allowing the use of such agreements. (The law review article which we provided you and which we have filed in the record of this proceeding suggests that the courts would concur in such a conclusion.) If "writing" is limited to "paper" contracts and the Commission decides to accept something less than "paper" contracts, i.e., on-line contracts, the Commission also has given adequate notice, since its new rules would reflect a lesser included alternative than that originally proposed by the Notice.

As concerns the adequacy of the record, GEIS submits that the adoption of a rule that includes on-line contracts within the term "writing" reflects a legal, rather than factual or policy, judgment. Moreover, the materials which GEIS has filed in the record of this proceeding documenting its ex parte presentations to you and your staff provide more than adequate support for the adoption of a rule allowing the use of on-line agreements. Clearly, the Commission is entitled to -- and, in the past, has concluded that it may -- act on the basis of such ex parte presentations in a rulemaking proceeding where, as here, those presentations are formally part of the record. See, e.g., Authorizing Private Carrier Systems in the Private Operational-Fixed Microwave Radio Service, PR Docket No. 83-426, FCC 85-53, 50 Fed. Reg. 13338 (¶ 67) (Apr. 4, 1985) (decision to preempt states predicated solely on two ex parte statements).

We hope the foregoing is responsive to your inquiries. GEIS would be pleased to meet with you or your staff to discuss its proposals at greater length. In the interim, please let us know if you have any questions or if we can provide you with any additional information.

Sincerely,

Joseph P. Markoski

Joseph P. Markoski

/jef

cc: William F. Caton
John B. Muleta
Mary Beth Richards
Mary Romano
Warner Sinback

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OFFICE OF SECRETARY

Legal Responses to Commercial Transactions Employing Novel Communications Media

John Robinson Thomas

It is becoming more and more important that the rules governing negotiations made by telegraph should be clearly defined and settled, as contracts thus made are constantly increasing in number and magnitude.

— Scott & Jarnagin,
A Treatise Upon the Law of Telegraphs, 1868.[1]

Electronic messaging systems and electronic data interchange are changing the way businesses negotiate and enter into contracts. These changes require a reexamination of fundamental contract principles.

— American Bar Association,
Report on Electronic Messaging, 1988.[2]

More than a century ago, the telegraph[3] revolutionized communications. For the first time, telegraphed messages spanned distances of thousands of miles, eliminating barriers of time and space.[4] The telegraph encouraged settlement of the West and the growth of cultural nationalism, and resulted in the development of the first significant industrial monopoly.[5] This device also significantly affected commerce. Americans formed countless contracts using the telegraph, which quickly became an everyday tool of business.[6] Commercial users also rapidly adopted a later communications technology, tele-

1. WILLIAM L. SCOTT & MILTON P. JARNAGIN, A TREATISE UPON THE LAW OF TELEGRAPHS § 296 (1868).

2. AMERICAN BAR ASSN., ELECTRONIC MESSAGING, A REPORT OF THE AD HOC SUBCOMMITTEE ON SCOPE OF THE U.C.C. 5 (1988) (Electronic Messaging Services Task Force) [hereinafter ELECTRONIC MESSAGING].

3. A telegraph employs electrical impulses which are transmitted and received as encoded signals. *See generally* Smith v. Downing, 22 F. Cas. 511 (C.C.D. Mass. 1850) (No. 13,036). Early telegraph systems were simple electrical circuits: when an operator closed a switch at the sending station, current flowed to the recipient's sounder and caused it to click. Telegraph companies have since constructed more complex multiplexing and nationwide switching systems. To send a telegram, a user delivers a message to the office of the telegraph company. The company routes the message through telegraph lines to an office near the recipient, delivering it by hand or through the United States Postal Service. The delivered message is termed a "mailgram." *See* Herbert D. Benington, *Electronic Mail, in* INNOVATIONS IN TELECOMMUNICATIONS, 887, 903-05 (Jamal T. Manassah ed., 1982).

4. *See, e.g.,* ROBERT L. THOMPSON, WIRING A CONTINENT: THE HISTORY OF THE TELEGRAPH INDUSTRY IN THE UNITED STATES (1947).

5. *Id.* at viii.

6. *See, e.g.,* Tyler, Ullman & Co. v. Western Union Tel. Co., 60 Ill. 421, 440 (1871).

type systems.[7] Legal uncertainties hampered these early communications, however, because the new technologies challenged long established rules of contract law and evidence. Eventually, business users and courts developed practices and legal standards accommodating use of the new technologies.

A similar revolution in communications technology is occurring today. Telefacsimile (fax) machines[8] and electronic mail networks[9] have become commonplace features of our "Information Society."[10] Business users transmit information through these systems as readily

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7. Such systems are also known as telex or TWX machines. A teletype user purchases an electrical line, terminal, and teleprinter for individual use and subscribes to a communications service. Subscribers then initiate communications in a fashion similar to dialing a number on an ordinary telephone. The two terminals exchange unique identifiers, or "answerbacks," to verify the parties' identities. *See* BENJAMIN WRIGHT, THE LAW OF ELECTRONIC COMMERCE § 1.1.3 (1991). The sender then types a message on the teletypewriter, which converts the entered letters into a digital character code. The message is immediately transmitted, decoded and printed by the recipient's teleprinter. *Id.*

8. Telefacsimile machines are also known as telecopiers or telefax machines. Bradford W. Hildebrandt, *The Use of Facsimile by Law Firms*, N.Y. L.J., Mar. 11, 1986, at 4. Modern telefacsimile technology allows the transmission of a fixed image as an electrical signal over telephone lines. *See* Secure Serv. Tech. v. Time & Space Processing, Inc., 722 F. Supp. 1354, 1355 (E.D. Va. 1989); David A. Sokasits, Note, *The Long Arm of the Fax: Service of Process Using Fax Machines*, 16 RUTGERS COMPUTER & TECH. L.J. 531 (1990). Users plug a telefacsimile machine, commonly known as a fax machine, into an ordinary telephone jack. The sender places documents into the telefacsimile machine, which converts the shades of black and white on the paper into digital signals. *See, e.g.*, MICHAEL BANKS, UNDERSTANDING FAX AND ELECTRONIC MAIL 34-40 (1990). To transmit these signals, the sender dials the telephone number of the recipient's telefacsimile machine. The two telefacsimile machines communicate through various protocols, such as Consultative Committee for International Telephone and Telegraph (CCITT) G3. *See id.* at 13-14. The receiving unit turns the signal back into a black-and-white document, usually through the oxidation of chemically treated, thermally activated paper by heated wires. *See id.* at 49-53. Recently introduced telefacsimile machines employ laser technology to print on ordinary paper. *Id.* at 52-53.

9. Electronic mail systems provide the ability to receive on a computer terminal a message originating on another terminal. *See The Commercial Use of Electronic Data Interchange — A Report and Model Trading Partner Agreement*, 45 BUS. LAW. 1645, 1649 (1990) (Electronic Messaging Services Task Force of the American Bar Association) [hereinafter *Report and Model Trading Agreement*]; ELECTRONIC MESSAGING, *supra* note 2, at 27. The terminals may be adjacent or thousands of miles apart. In a typical communication, a user types a message into a computer and routes it through a communications network to the "mailbox" of the recipient. *See* BANKS, *supra* note 8, at 119-44. The "mailbox" is a storage area for digitally encoded information; the message remains there until the recipient checks the mailbox and reads his messages. Either party may store the message electronically, on magnetic media, or print the message onto paper.

This Note does not distinguish between electronic mail and "electronic data interchange" (EDI). Although both media transmit messages between computers in the same fashion, electronic mail messages consist of ordinary text for individual users to read. In contrast, EDI messages are composed of computer-readable data that accounting and inventory systems can manipulate without human intervention. *See* ALVIN TOFFLER, POWERSHIFT 120-21 (1990). For sources that consider the differences between electronic mail and EDI, see WRIGHT, *supra* note 7; *Report and Model Trading Agreement*, *supra* note 9.

10. *See, e.g.*, Debra J. Mayberry, *Introductory Note* to FACSIMILE USERS' DIRECTORY at v (Debra J. Mayberry ed., 1990); CARL TOWNSEND, ELECTRONIC MAIL AND BEYOND 11 (1984). *See generally* YONEJI MASUDA, THE INFORMATION SOCIETY AS POST-INDUSTRIAL SOCIETY (1981).

and quickly as by telephone, circumventing the delays and expense of delivery services.[11] This capability allows parties to negotiate and enter into complex written agreements with all the efficiency that our fast-paced and global business environment demands.[12] These devices also expedite more mundane commercial relationships, such as invoice and purchase order submission. In this context, telefacsimile or electronic mail use reduces transmission delays, inventory costs, and the amount of paper produced in the transaction.[13]

Not surprisingly, legal rules have failed to maintain the pace of this rapid change in technology. Few courts have considered the use of these technologies in a commercial setting. As happened in the early days of telegraphy, the resulting legal uncertainty hinders development of the new media and encourages inefficient business practices. Wary business users, unsure of how the law of evidence and contracts will govern electronically recorded transactions, often exchange copies of such communications by messenger or mail.[14] This resort to older, slower media allows contracting parties to be certain of the operative law, but eliminates the advantages that prompted the use of telefacsimile and electronic mail systems.

Many business users are less cautious, however, so courts will increasingly encounter contracts recorded through these new media without reference to a traditional document.[15] Pessimistic observers worry that the standards developed by courts will undercut the efficiency of the technologies they embrace;[16] of course, these standards

11. *See, e.g.*, BANKS, *supra* note 8, at 16; Michael M. Sherry, *How to Find the Fax That Fits the Firm — A Modern Necessity*, NATL. L.J., Jan. 30, 1989, at 19 ("The [telefacsimile] machine is quickly becoming a requirement in the modern office.").

12. An attorney recently noted that:

> The full power of the fax hit me when I was putting together a deal in Germany a few months ago. Three of the parties were in Bonn, the other in Las Vegas.
>
> We sent the German proposal to the American by fax. Five minutes later he returned the same document to us with some suggested changes in the wording. The Germans agreed, put their initials on the changes, and faxed back the American's fax. The Nevada party signed on the dotted line and returned the finalized contract. The whole process took only 20 minutes.

Larry Johnson, *The Joy of Fax*, A.B.A. J., July 1989, at 102, 102.

13. *See* Halina S. Dziewit et al., *The Quest for the Paperless Office Electronic Contracting: State of the Art Possibility but Legal Impossibility?*, 5 SANTA CLARA COMPUTER & HIGH TECH. L.J. 75, 76-77 (1989) (noting, inter alia, that Levi-Strauss retailers have cut the amount of time needed to order supplies from one month to two weeks through the use of electronic mail systems).

14. *See Troublesome Legal Issues Threaten Industry Progress*, NETWORK WORLD, June 13, 1988, at 34; John Burgess, *Those Fax-tastic Machines are Revolutionizing Office Communications*, L.A. TIMES, July 12, 1988, at D12 ("One brake on [telefacsimile] growth is that the legal validity of the copies remains in question. . . . If there is ever a question, many companies will follow up a [telefacsimile] with an original by messenger or mail.").

15. Courts have considered commercial documents transmitted by telefacsimile machines on only a few occasions. *See infra* notes 79-85, 170-71 and accompanying text. However, no published opinion has yet contemplated a contract formed through electronic mail.

16. *See* Michael Baum, *Signed, Sealed, and . . . Delivered?*, NETWORK WORLD, June 27, 1988, at 53.

might also provide users with insufficient protection against fraud or transmission errors. Courts are not without guidance in this task, however, for they have struck balances between the concerns of efficiency and accuracy since the early days of the telegraph and teletype.[17] These decisions provide an appropriate framework for analyzing the use of modern communications technologies in a commercial setting, but should not control the analysis alone. Although the media considered herein — telegraph, teletype, telefacsimile, and electronic mail — are steps along an increasingly sophisticated spectrum of communications systems,[18] thereby providing courts and scholars with ready analogies,[19] the distinctive features of each technology vitiate such comparisons. The more advanced systems often fit into the existing legal landscape less readily than did their simpler predecessors. A meaningful analysis of the legal issues must pay careful attention to the specific characteristics of each of these technologies.

This Note analyzes contemporary business practices and specific characteristics of the new media, and suggests a judicial response consonant with courts' approaches to the earlier technologies of telegraphy and teletype. Part I examines the effect of the Statute of Frauds and rules of authentication upon contracts formed using these media. It concludes that documents produced by telefacsimile and electronic mail systems should be considered ordinary writings. Part II considers the Best Evidence Rule and argues that telefacsimiles and electronic mail transmissions should be considered the best evidence of the contract they memorialize. Part III evaluates doctrines of liability allocation in the event of a transmission error while employing these media. It concludes that these doctrines are based upon theories of agency, common carriage, and contract law, rather than characteristics of individual media, and that telefacsimile and electronic mail systems do not require reconsideration of these doctrines. This Note concludes that telefacsimile and electronic mail services, like earlier systems of telegraphy and teletype, should be recognized as legally acceptable media for contract formation.

17. *See infra* notes 43-47, 55-57, 67-71, 152-58, 188-220 and accompanying text.

18. *See Report and Model Trading Agreement, supra* note 9, at 1686; Brad Schultz, *Electronic Mail*, U.S. BANKER, Feb. 1989, at 53; Henry Geller & Stuart Brotman, *Electronic Alternatives to Postal Service, in* COMMUNICATIONS FOR TOMORROW: POLICY PERSPECTIVES FOR THE 1980S, at 308, 320 (Glen O. Robinson ed., 1978).

19. *See, e.g.*, People v. Hagan, 556 N.E.2d 1224 (Ill. App. Ct. 1990), *affd.*, 1991 WL 242340 (Ill. 1991) (comparing telefacsimiles and telegrams); Beatty v. First Exploration Fund 1987 & Co., 25 B.C.L.R.2d 377 (1988) (comparing telefacsimiles and photocopies).

I. Devices for Promoting Fraud? Communications Technologies, Authentication and the Statute of Frauds

Two legal rules, the Statute of Frauds and the evidentiary requirement of authentication, have hindered the use of telefacsimile and electronic mail systems in commercial transactions.[20] First, the Statute of Frauds requires certain contracts to be written and signed if they are to be legally binding.[21] Unfortunately, these new technologies cannot transmit handwritten signatures, and the application of the term "writing" to telefacsimiled documents and intangible electronic messages is subject to debate. Second, the requirement of authentication, a condition precedent for the admissibility of evidence, "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."[22] Parties can authenticate ordinary handwritten or typed documents by demonstrating that a claimed connection exists between an individual and the writing.[23] A stricter standard of authentication might be warranted for newer technologies, however, if these media are unreliable or particularly prone to fraud.

Since litigants must meet both the authentication and Statute of Frauds requirements to prove the existence of certain contracts, and each requirement limits the perpetration of fraud or occurrence of mistake,[24] this Part analyzes their impact upon new communications technologies together. Section I.A examines judicial responses to claims that contracts memorialized through telegrams or teletype failed to satisfy the Statute of Frauds. The section then considers how courts applied the evidentiary requirement of authentication to such documents. Section I.B applies the principles expressed in these cases to the commercial use of telefacsimile and electronic mail systems. This Part argues that neither the Statute of Frauds nor the requirement of authentication should bar the admission of telefacsimiles or

20. *See* BANKS, *supra* note 8, at 16; Jeffrey Rothfeder, *The Scoop on Snooping: It's a Cinch*, BUS. WK., Sept. 4, 1989, at 82 ("My [telefacsimiled] signature . . . isn't legally binding."); Robert J. Bruss, *Real Estate Q&A*, L.A. TIMES, Apr. 22, 1990, at K6 ("Faxed Counteroffer May Not Be Binding.").

21. U.C.C. § 2-201(1) (1990) provides:

> [A] contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.

The Statute of Frauds also applies to other sorts of contracts, such as those not to be performed within one year and those conveying on interest in land. Act for Prevention of Frauds and Perjury, 1677, 29 Car. 2, ch. 3, § 4 (Eng.).

22. FED. R. EVID. 901(a).

23. MCCORMICK ON EVIDENCE § 218 (Edward W. Cleary et al., eds., 3d ed. 1984) [hereinafter MCCORMICK].

24. *See* 2 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 275 (1950) (Statute of Frauds); MCCORMICK, *supra* note 23, § 218 (authentication).

electronic mail messages as evidence of contracts memorialized through these media.

A. *Telegraph and Teletype Systems*

1. *The Writing Requirement of the Statute of Frauds*

The Statute of Frauds has ancient roots. Its framers, the English Parliament of 1677, believed that the rise of the action of assumpsit, which could result in judicial enforcement of oral contracts, had increased the opportunity for fraud through perjured testimony. By mandating that "some note or memorandum in writing . . . signed by the parties to be charged" exist for "contract[s] for the sale of any goods, wares and merchandi[s]es, for the price of ten pounds sterling or upwards . . . to be good,"[25] Parliament hoped to prevent imposing contractual obligations on unconsenting or unwary individuals.[26] Subsequent codifications of the law of commercial transactions substantially retained the Statute. The Uniform Sales Act demands a "note or memorandum in writing" as evidence of certain contracts,[27] while the Uniform Commercial Code requires merely a "writing."[28]

Despite considerable judicial experience in construing the simply worded Statute of Frauds,[29] the absence of a definition for the term "writing" within the Statute of Frauds creates uncertainty when applied to documents memorialized on unusual media. The drafters of the original English statute probably used the term to mean the notes made by merchants in the ordinary course of business.[30] But changing technologies and unusual circumstances have resulted in the submission of other sorts of documents before courts. These cases often in-

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25. 29 Car. 2, ch. 3, § 17 (1677) (Eng.). The English Parliament has repealed § 17 of the Statute of Frauds. *See* CORBIN, *supra* note 24, § 275 (Supp. 1991).

26. *See* CORBIN, *supra* note 24, § 275 ("The purpose of [the Statute] was to prevent the foisting of an obligation of specified classes by perjury upon one who had never assented to assume it.").

27. The Uniform Sales Act provides:

> A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.

UNIF. SALES ACT § 4, 1 U.L.A. 17 (1922).

28. U.C.C. § 2-201(1) (1990). Although this discussion is limited to the Statute of Frauds, the U.C.C. also has a writing requirement in other sections, *e.g.*, §§ 2A-201(1)(b) (lease contracts), 7-202(2) (warehouse receipts), 9-203(1)(a) (security arrangements). The U.C.C. is the first version of the Statute of Frauds to define "writing." Section 1-201(46) provides that the term writing "includes printing, typewriting, or any other intentional reduction to tangible form." U.C.C. § 1-201(46) (1990).

29. The Statute of Frauds has been "interpreted and applied by the courts in tens of thousands of cases." CORBIN, *supra* note 24, § 275.

30. *See* E. Rabel, *The Statute of Frauds and Comparative Legal History*, 63 LAW Q. REV. 174, 182-83 (1947).

volve wills, which are also governed by the writing requirement of the Statute of Frauds.[31] Parties have proffered an assortment of unlikely substitutes for paper and ink, such as an eggshell,[32] corn bin,[33] bedpost,[34] sailor's identification disk,[35] tractor fender,[36] and other sundry objects[37] as wills for probate. In these cases, courts have read the Statute liberally, and considered these unusual submissions within the writing requirement.[38]

Another early decision considering a more common means of communication, the lead pencil, further demonstrates courts' broad reading of the Statute. In *Clason v. Bailey,*[39] the court enforced a contract written in pencil under the writing requirement of the Statute of Frauds. It considered the essence of writing to be the expression of ideas by letters rather than the "mode or manner of impressing those letters."[40] The decision acknowledged the development of communications technology, reviewing means of writing such as iron pen on stone, metal, and waxed tablets, and finally ink on paper. The court added that the acceptable means of writing have "been left to be governed by public convenience and usage; and as far as questions have arisen on this subject, the Courts have, with great latitude and liberality, left the parties to their own discretion."[41] A reference to a requirement of "durability and safety" of the completed writings tempered this dictum.[42]

Consistent with these earlier readings of the Statute of Frauds, courts rapidly accepted telegraphed messages as a valid means of memorializing a contract. One such court, rejecting arguments that telegrams were not writings, found

> it makes no difference whether . . . [the telegraph] operator writes the offer or the acceptance in the presence of his principal and by his express direction, with a steel pen an inch long attached to an ordinary pen-

31. 29 Car. 2, ch. 3, § 5 (1677) (Eng.).

32. *In re* Goods of Barnes, 136 L.T.R. 380 (1927).

33. Sidney T. Miller, *Notes on Some Interesting Wills,* 12 MICH. L. REV. 467, 468 (1914).

34. *Id.*

35. *A Microscopic Will,* 66 SOLIC. J. 638 (1922).

36. W.M. Elliott, Case and Comment, 26 CANADIAN B. REV. 1242 (1948).

37. *See* VIRGIL M. HARRIS, ANCIENT, CURIOUS, AND FAMOUS WILLS 167-69 (1912) (discussing wills prepared on a door, a card torn from a freight train, a collar box, and wrapping paper).

38. *See* Houston P. Lowry, *Does Computer Stored Data Constitute a Writing for the Purposes of the Statute of Frauds and the Statute of Wills?,* 9 RUTGERS COMPUTER & TECH. L.J. 93, 94-95 (1982).

39. 14 Johns. 484 (N.Y. 1817).

40. 14 Johns. at 491.

41. 14 Johns. at 491.

42. The common law has gone so far to regulate writings, as to make it necessary that a deed should be written on paper or parchment, and not on wood or stone. This was for the sake of durability and safety; and this is all the regulation that the law has prescribed.

14 Johns. at 491.

> holder, or whether his pen be a copper wire a thousand miles long. In either case the thought is communicated to the paper by the use of the finger resting upon the pen; nor does it make any difference that in one case common record ink is used, while in the other case a more subtle fluid, known as electricity, performs the same office.[43]

Courts usually paid little attention to the reliability of telegraphy when considering the fit of telegrams within the Statute of Frauds; those that did favorably compared telegraphy to the postal system.[44] The courts acknowledged that failure to accept telegrams as writings under the Statute of Frauds "would certainly impair the usefulness of modern appliances to modern business, tend to hamper trade, and increase the expense thereof."[45] Little dissent accompanied this rule; indeed, later decisions in this area seldom questioned the categorization of telegrams as writings.[46]

Following these analyses, courts also were willing to enforce contracts made using teletype machines under the writing requirement of the Statute of Frauds. As with telegraphy, courts took "a realistic view of modern business practices" and held that teletyped messages satisfied the writing requirement.[47]

2. *The Signature Requirement of the Statute of Frauds*

In addition to a writing requirement, the Statute of Frauds requires valid contracts to bear the defendant's signature. As with the writing requirement, courts have often considered affixations that are outside the ordinary meaning attached to the term "signature" — a person's name handwritten in ink. Acceptable substitutes include marks;[48] stamped,[49] printed,[50] and typewritten[51] names; and letterheads.[52] Courts found each of these variations to be a "signature," relying upon the parties' intent to employ the handwritten signature

43. Howley v. Whipple, 48 N.H. 487, 488 (1869).

44. *See, e.g.*, Western Twine Co. v. Wright, 78 N.W. 942, 943 (S.D. 1899) ("As a rule, to which an exception is very rare, all letters and all telegrams with equal certainty reach their destination, and, the reasonable intendments with reference to each being identical, the same legal presumption may well be entertained as to both."). Courts often painted a different picture of telegraphy when considering the prospective liability of telegraph companies for transmission errors. *See infra* Part III.

45. Brewer v. Horst-Lachmund Co., 60 P. 418, 420 (1900).

46. *See, e.g.*, Smith v. Easton, 54 Md. 138, 146-47 (1880).

47. *See, e.g.*, Joseph Denuzio Fruit Co. v. Crane, 79 F. Supp. 117, 128-29 (S.D. Cal. 1948), *vacated*, 89 F. Supp. 962 (S.D. Cal. 1950), *reinstated*, 188 F.2d 569 (9th Cir. 1951), *cert. denied*, 342 U.S. 820 (1951).

48. *See In re* Walker's Estate, 42 P. 815, 816 (Cal. 1895).

49. *See In re* Deep River Natl. Bank, 47 A. 675, 677 (Conn. 1900).

50. *See* Wright v. Seattle Grocery Co., 177 P. 818, 820 (Wash. 1919); Berryman v. Childs, 153 N.W. 486, 487-88 (Neb. 1915).

51. *See* Smith v. Milliken Bros., 93 N.E. 184, 184-85 (N.Y. 1910).

52. *See* Drury v. Young, 58 Md. 546, 553-54 (1882).

substitute as an endorsement.[53]

Consonant with this approach, the law quickly recognized telegraphed "signatures" and approved them within the Statute of Frauds.[54] A recent decision illustrated the rationale of these early cases by considering "[t]he telegram with the typed signature of defendant's name [to have] emanated from the defendant which is responsible for it."[55] In addition to focusing upon the parties' intent, courts also deferred to the routine business use of telegrams as a contracting medium. Courts were similarly quite willing to accept both teletyped "signatures" delivered in teletypewritten form[56] and a teletype terminal's answerback[57] as signatures within the Statute of Frauds.

3. *Authentication*

The law of evidence requires that writings must be "authenticated" to be admitted into evidence.[58] Although the rule is said to "defy precise definition,"[59] authentication requires proof that an article is what the offering party claims it is.[60] A party seeking to authenticate a message may employ direct evidence to link a document with a person.[61] Witnesses, for example, may testify they observed an individual signing a letter or contract.[62] A court may also accept authenticating evidence such as lay or expert testimony regarding the author's handwriting style.[63] Additionally, such parties may employ circumstantial evidence, such as the document's location or accompanying items, to authenticate that writing.[64] Further, under the reply letter doctrine, courts will admit a letter into evidence as a reply if it responds, with-

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53. *See also* General Motors Acceptance Corp. v. Anacone, 197 A.2d 506, 512-13 (Me. 1964) (holding that an agent's facsimile signature qualifies as a "signature" if it is affixed both with intent to endorse and with authority). The U.C.C. drafters subsequently codified this requirement. *See* U.C.C. § 1-201(39) (1991) (providing that " '[s]igned' includes any symbol executed or adopted by a party with present intention to authenticate a writing").

54. *See* Trevor v. Wood, 36 N.Y. 307 (1867); Howley v. Whipple, 48 N.H. 487 (1869).

55. La Mar Hosiery Mills, Inc. v. Credit & Commodity Corp., 216 N.Y.S.2d 186 (1961).

56. *See* Joseph Denuzio Fruit Co. v. Crane, 79 F. Supp. 117 (S.D. Cal. 1948), *vacated*, 89 F. Supp. 962 (S.D. Cal. 1950), *reinstated*, 188 F.2d 569 (9th Cir.), *cert. denied*, 342 U.S. 820 (1951); Klein v. PepsiCo, Inc., 845 F.2d 76 (4th Cir. 1988).

57. *See* Clipper Maritime Ltd. v. Shirlstar Container Transp. Ltd., 1 Lloyd's Rep. 546, 554 (1987); Miller v. Wells Fargo Bank Intl. Corp., 406 F. Supp. 452 (S.D.N.Y. 1975), *affd.*, 540 F.2d 548 (2d Cir. 1976).

58. FED. R. EVID. 901(a) ("The requirement of authentication or identification [is] a condition precedent to admissibility . . . .").

59. MCCORMICK, *supra* note 23, § 218.

60. FED. R. EVID. 901(a).

61. MCCORMICK, *supra* note 23, § 219.

62. EDWARD J. INWINKELRIED, EVIDENTIARY FOUNDATIONS 37 (2d ed. 1989).

63. *Id.* at 38.

64. MCCORMICK, *supra* note 23, § 222 (When "no direct evidence of authenticity of any type exists or can be found [r]esort must then be had to circumstantial proof.").

out unusual delay, to a previous letter.[65] This doctrine is based upon the judicial assumption that the mails are reliable.[66]

Soon after the introduction of telegraphy, courts faced cases challenging them to develop a concept of authentication suited to the characteristics of the technology. Courts might have demanded elaborate testimony on such matters as the validity and acceptance of the scientific principles which underlie telegraph technology, the reliability of the particular telegraph system involved, or the dependability of the operators who entered messages for transmission. Instead, courts applied the previously established rules of authentication for writings.[67] Because concern for the prevention of fraud and mistake underlie both the Statute of Frauds and the requirement of authentication, this result was consistent with the qualification of telegrams as "writings" within the Statute.[68] If courts considered telegrams as safe and as durable[69] as other writings for purposes of the Statute of Frauds, they could also readily subject telegrams to the standards of authentication developed for writings. Courts also allowed telegrams to be authenticated in two ways not generally apposite to other documents. First, parties could introduce telegraph company authorization forms, on which customers would write the message they wished to send.[70] Additionally, parties could call an employee of the telegraph company as an authenticating witness.[71]

Despite acceptance of telegrams under the Statute of Frauds, a minority of courts disagreed with the notion of telegraphy as a reliable medium worthy of the same evidentiary standards as handwritten documents.[72] The lack of confidentiality of telegrams, accompanied by the increased opportunity for fraud,[73] also concerned courts. Not only were such messages read by the recipient, but employees of the telegraph company also had access to transmitted messages. Occasionally, decisions reflected this caution; for instance, some jurisdictions

65. *Id.* § 225.

66. INWINKELRIED, *supra* note 62, at 39.

67. 29 AM. JUR. 2D *Evidence* § 883 (1967) ("A telegram, like any other document, is admissible in evidence only where authenticated. There must be some competent proof that it is genuine and that it was written and sent by the person whose name it bears.") (footnotes omitted).

68. *See supra* text accompanying notes 43-47.

69. *See supra* text accompanying note 42.

70. *See, e.g.,* Ford v. United States, 10 F.2d 339, 350 (9th Cir.), *affd.,* 273 U.S. 593 (1926).

71. *See, e.g.,* Hall v. Western Union Tel. Co., 162 F. 657 (7th Cir. 1908); Peterman v. Vermont Sav. Bank, 159 So. 598 (La. 1935).

72. MCCORMICK, *supra* note 23, § 225.

73. *Id.* One commentator noted:

> [While] it is unnecessary to disclose the intelligence contained in a letter to any one to effect its transportation by mail, it is absolutely necessary to disclose intelligence to at least two operators to effect its transmission by telegraph. Consequently, the telegraph offers far greater opportunity to deliver fraudulent answers to inquiries than the mail does.

MORRIS GRAY, A TREATISE ON COMMUNICATION BY TELEGRAPH § 135 (1885).